Perez v. Mortgage Bankers Association: Are There Now Four Votes on the Supreme Court to Overrule Auer?

March 10, 2015 by Guest Blogger Leave a Comment

Today we welcome back Patrick Smith of Ivins, Phillips & Barker who follows up on his post on Perez v Mortgage Bankers Association in light of this week's Supreme Court opinion in the case. Pat walks us through the thicket of administrative law doctrine and in particular the possibly unsteady ground of Auer deference relating to agency views of its own guidance. Les

On Monday of this week, the Supreme Court issued its opinion in *Perez v.Mortgage Bankers Association*. In an earlier post on PT in October, I discussed this case. This case involves the issue of whether the D.C. Circuit has been incorrect in its *Paralyzed Veterans* line of cases. The *Paralyzed Veterans* rule involves the requirement in the Administrative Procedure Act (APA) that requires agencies to use notice-and-comment rulemaking to adopt "substantive" or "legislative" rules but not when they adopt "interpretative" rules, because substantive or legislative rules have the force of law, but interpretative rules do not.

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The D.C. Circuit rule in *Paralyzed Veterans* said that an agency must use notice-and-comment rulemaking when it changes its interpretation of one of the agency's substantive or legislative rules, even though the interpretation itself represents only an interpretative rule that would not otherwise be subject to the notice-and-comment requirements. When stated in this way, without any further context, the *Paralyzed Veterans* rule seems clearly inconsistent with the terms of the APA.

In my prior post, I argued that *Paralyzed Veterans* was nevertheless justified because of the Supreme Court's line of cases holding that an agency's interpretations of its own regulations must be given deference, without regard to whether those interpretations are embodied in regulations issued using notice-and-comment rulemaking. This deference is usually referred to today as *Auer* deference. I argued that giving deference to an agency's interpretation of one of its own substantive regulations meant that the interpretation should be considered itself a substantive regulation because giving deference to an agency position is equivalent to giving that position the force of law.

The plaintiffs in the case had not made this argument in the D.C. Circuit or in their brief in opposition to the government's petition for certiorari. However, in their merits brief in the Supreme Court, filed the day after my post, they made this argument as an alternative argument in support of the *Paralyzed Veterans* rule. In addition, a number of *amicus curiae* briefs subsequently filed in support of the plaintiffs also relied on *Auer* as support for the *Paralyzed Veterans* rule.

In the Supreme Court decision issued on Monday, the Court held unanimously, with a majority opinion by Justice Sotomayor, that the *Paralyzed Veterans* rule was incorrect because it was in conflict with the terms of the APA. The court held that the plaintiffs had waived the argument that the agency interpretation that was at issue should be considered a substantive rule for purposes of the APA notice-and-comment requirement as a result of the *Auer* principle because the plaintiffs had not raised this argument in the D.C. Circuit or in their brief in opposition to the petition for certiorari.

The holding in *Mortgage Bankers Association* is clearly significant in its direct application. What may be even more significant about the opinion is what the concurring opinions in the case say about *Auer*. Three justices wrote concurring opinions and all three focused on criticism of *Auer*. In several previous Supreme Court decisions over the past few years, there have been criticisms of *Auer* in either separate opinions or as dictum in the majority opinion. What is notable about *Auer* is that in this case a fourth justice has now joined the three who had previously written or joined separate opinions calling for *Auer* to be at least reconsidered if not overruled.

The first of these separate opinions in earlier cases was Justice Scalia's concurring opinion in *Talk America*. The majority opinion in *Talk America*, written by Justice Thomas, applied the *Auer* principle without including any criticism of *Auer*. In Justice Scalia's concurring opinion, he noted that he would reach the same result as the majority but without relying on *Auer*, and that he would be open to reconsidering *Auer*, based on the concept that letting an agency adopt authoritative interpretations of its own rules improperly combines the lawmaking and interpretative functions:

> It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." "[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.

In *Christopher v. SmithKline Beecham*, Justice Alito's majority opinion held the *Auer* principle inapplicable, but also echoed the criticisms from Justice Scalia's *Talk America* concurrence. "Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit."

In *Decker*, the majority opinion, written by Justice Kennedy, applied *Auer*

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without any criticism. Justice Scalia, in a lengthy opinion concurring in part and dissenting in part, went beyond what he had said in his concurring opinion in *Talk America* and flatly said *Auer* should be overruled. Not only did Justice Scalia move from favoring reconsideration of *Auer* to strongly advocating overruling it, but Chief Justice Roberts, in a concurring opinion joined by Justice Alito, noted that Justice Scalia's separate opinion "raises serious questions about the principle set forth in" *Auer*. However, he concluded that this case was not an appropriate one for doing so because the issue was raised only in footnotes, not in the briefs. "The issue is a basic one going to the heart of administrative law….The bar is now aware that there is some interest in reconsidering [*Auer*], and has available to it a concise statement of the arguments on one side of the issue." Thus, after *Decker* was decided, three justices were on record as favoring reconsidering *Auer*, if not overruling it outright.

In *Mortgage Bankers Association*, the majority avoided expressing any view on whether *Auer* is a sound principle, noting only in a footnote:

> MBA alternatively suggests that interpretive rules have the force of law because an agency's interpretation of its own regulations may be entitled to deference under *Auer*….Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases.

As Justice Scalia's concurring opinion observed, the majority opinion's reasoning in this passage "would not withstand a gentle breeze." It is somewhat odd that the majority opinion separates this reference to *Auer* in a footnote from its discussion at the end of the main text that the plaintiffs waived their argument that the interpretation should be viewed as a substantive rule, since the basis for this argument was the fact that the interpretation would be given *Auer* deference. However, it was reasonably clear from the oral argument that most if not all of the justice felt that the plaintiffs had not properly presented this argument and that as a result this argument would not be considered as a basis for deciding the case.

Three justices wrote separate concurring opinions in *Mortgage Bankers*. The theme of the concurring opinions was that the D.C. Circuit *Paralyzed Veterans* rule was a flawed attempt to deal with the genuine issues raised by *Auer*. Justice Scalia repeated his position from his concurring opinion in *Decker* that *Auer* should be overruled but here focused on a different reason, namely the requirement in the APA that "the reviewing court shall…interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." He notes: "The Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." Consistent with what I have argued, Justice Scalia notes that *Chevron* could be seen as being in conflict with the APA requirement that "the reviewing court shall…interpret…statutory provisions," but for purposes of this case, he argues only that *Auer* is in conflict with the APA requirement that "the

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reviewing court shall… determine the meaning or applicability of the terms of an agency action." He also fully endorses a central part of the argument I made in my prior post on this case. He says without reservation: "Interpretive rules that command deference *do* have the force of law."

Justice Alito wrote a very brief concurring opinion that basically repeats the concurring opinion of Chief Justice Roberts from *Decker* that he joined. He noted that the other concurring opinions "offer substantial reasons why the [*Auer*] doctrine may be incorrect…. I await a case in which the validity of [*Auer*] maybe explored through full briefing and argument."

What is most notable about the concurring opinions in *Mortgage Bankers* is the opinion by Justice Thomas. As noted earlier, he wrote the majority opinion in *Talk America*, where Justice Scalia's concurring opinion first expressed his doubts about *Auer*, but Justice Thomas's majority opinion in that case expressed no criticisms of *Auer*. In *Mortgage Bankers*, however, he wrote a concurring opinion that is substantially longer than the majority opinion and that while it does not explicitly state that he has concluded *Auer* should be overruled, leaves very little doubt that he would vote in favor of that result when the issue is presented directly.

Moreover, it is hard to see how much of the reasoning in his opinion would not be equally applicable against *Chevron* itself. He argues at great length that the constitutional structure requires that the courts exercise independent judgment in interpreting the law. If this precludes agencies from being the authoritative interpreters of their own regulations, it should likewise preclude agencies from being the authoritative interpreters of the statutes they enforce and administer.

However, while Justice Thomas might provide the only likely vote to overrule *Chevron*, it seems clear that after *Mortgage Bankers*, there are now at least four votes to consider overruling *Auer*.

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